TAB 12

Indexed as:

Citibank Canada v. Chase Manhattan Bank of Canada

IN THE MATTER OF The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
AND IN THE MATTER OF The Personal Property Security Act, 1989 R.S.O. 1989, c-16
AND IN THE MATTER OF a proposed plan of compromise and arrangement for the term secured creditors of Ball Packaging Products Canada, Inc.
Between
Citibank Canada, as Agent, Citibank Canada, Abn Amro Bank Canada, Hongkong Bank of Canada, Paribas Bank of Canada, the Toronto-Dominion Bank, Swiss Bank Corporation (Canada), the Bank of Tokyo Canada, Dai-Ichi Kangyo Bank (Canada), Credit Lyonnais (Canada), Banca Commerciale Italiana of Canada, Montreal Trust Company, Ball Packaging Products, Inc. through its Receiver, Ernst & Young Inc., and Banco Centrale of Canada, Applicants, and
The Chase Manhattan Bank of Canada, Ball Packaging Products Holdings Inc., Ball Corporation, La Caisse Centrale Desjardins du Quebec, and Union Bank of Switzerland (Canada), Respondents

[1991] O.J. No. 944

4 B.L.R. (2d) 147

5 C.B.R. (3d) 165

2 P.P.S.A.C. (2d) 21

27 A.C.W.S. (3d) 819

Court File No. 879/91Q

Ontario Court of Justice - General Division
Toronto, Ontario

Rosenberg J.

June 12, 1991

(33 pp.)

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Application under s. 5 and 6 of the Companies' Creditors Arrangement Act and under s. 67 and 70 of the Personal Property Security Act, 1989.

Peter Howard and Sean Dunphy, for the Receiver, Ernst & Young Inc. and the Applicants.
Barbara Grossman, for Ball Packaging Products Inc.
Randy A. Pepper, for Ball Corporation (a U.S. Corporation).
James H. Grout, for La Caisse Desjardins.
Dana B. Fuller and W.J. Demers, for Chase Manhattan and Union Bank of Switzerland.
Charles F. Scott, for Veriteck.
James Heal, for Onex and Banco Centrale of Canada.

ROSENBERG J.:--

PREAMBLE

In the months of March and April 1991, I dealt with a number of urgent matters regarding Ball Packaging Products Canada Inc. In some cases the time restrictions were such that there was not time to give oral reasons for my decisions. In one case the matter was finalized within a few minutes of a 12:00 noon deadline which will be explained in my reasons.

After finalizing the matters and now having finally discharged the Receiver, counsel involved requested that I give reasons. I have determined that it is appropriate to do so in case the matter is taken further or in case there are other actions arising out of the various steps taken in the appointment of a receiver and the receivership proceedings. I also felt that it would be advisable to have my reasons recorded for whatever value they may have as a precedent for similar proceedings in the future.

PR0CEEDINGS

In the first application heard on March 28, 1991, Ball Packaging Products Canada Inc. ("Ball Canada") asked for the following relief:

(a) A Declaration that the Applicant is a corporation to which the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (the "CCAA") applies notwithstanding the existence of a waiver dated December 9, 1988 excluding the CCAA;
(b) An Order authorizing the Applicant to file a formal plan of compromise or arrangement (the "Reorganization Plan");
(c) An Order that the Applicant call meetings of classes of its creditors and shareholders (the "Meetings");
(d) An Order that the Applicant may file the Reorganization Plan and the Notices of Meetings by way of affidavit;
(e) An Order staying all proceedings that have been or might be taken under the Bankruptcy Act;
(f) An Order restraining other proceedings in existing actions;
(g) An Order restraining future proceedings against the Applicant;
(h) An Order suspending and postponing the rights of any person, firm, corporation, company or other entity to realize upon or deal with any property

of the Applicant or security in respect of such property;

(i) An Order enjoining creditors from making demand for payment on the Applicant;

(j) An Order preventing creditors from exercising any right of set-off against debts owed to the Applicant;

(k) An order that all parties having agreements with the Applicant for the supply of goods or services to the Applicant be enjoined until further Order of the Court from terminating, determining or cancelling such agreements and in particular that the Applicant continue to be supplied goods, services and utilities so long as the Applicant pays the prices or charges incurred in accordance with the terms negotiated by the Applicant from time to time;

(l) An Order that all parties having other agreements with the Applicant be enjoined from terminating, determining or cancelling such agreements without the written consent of the Applicant or the Court;

(m) An Order that the Respondents which are parties (or assignees of such parties) to the loan agreement dated November 16, 1988 be enjoined from reducing the credit originally made available to the Applicant and that such Respondents continue to extend such credit, as is required by the Applicant, and as would be available If the Applicant were not in default;

(n) An Order permitting all obligations to unsecured creditors together with all obligations incurred by the Applicant after this Order to be paid or otherwise satisfied by the Applicant;

(o) An Order permitting the Applicant to serve this Notice of Application, the Supporting Affidavit, the Order requested, the Reorganization Plan and Notices of Meetings by mailing copies thereof to each of the Applicant's creditors;

(p) An Order that the Applicant shall render an Affidavit to the Court verifying the action taken and decisions reached at the Meetings;

(q) An Order that the Applicant shall remain in possession of its undertaking and shall continue to carry on its business and upon approval, to implement the Reorganization Plan.

Ball Canada also asked for other provisions in the order sought that are not relevant to this decision.

The applicants referred to in the style of cause in these present reasons were the respondents in that application. Those respondents brought a cross-application for the appointment of a receiver. The application was dismissed and the cross-application for the appointment of a receiver was allowed. At that time I gave oral reasons for my decision and there is no need to repeat those at this time except to note that it was clear from the affidavit material submitted on behalf of Bell Canada that":

> Unless there is a restructuring and unless operating funds are made available to the applicant during the restructuring agreement, the applicant cannot continue to carry on business and will have to cease operations Immediately. Given the magnitude of the applicant's operations across Canada, this would have a significant adverse effect on a large number of suppliers, customers and employees.

At that time the evidence indicated that Ball Corporation ("Ball U.S.") owned 50 percent of the issued and outstanding common preferred shares of Ball Canada and that negotiations had been continuing with Ball U.S. to finance an arrangement with creditors and invest sufficient capital to allow Ball Canada to continue to operate. The fact that the negotiations had not reached any finality after many months of negotiating was considered by me in refusing to allow further time to attempt to finalize a deal with Ball U.S. The evidence of Ball Canada indicated that they could not carry on without the

respondent financial institutions advancing more money which they were not contractually obliged to do in view of Ball Canada's default. After the receiver took possession on April 10, 1991, I heard an application by Citibank which applied amongst other things for:

(a) A Declaration that the Applicant Ball Packaging Products Canada, Inc. is a corporation to which the CCAA applies:

(b) An Order waiving the requirement for a meeting approving the Term Secured Compromise dated April 9, 1991, annexed hereto as Schedule "A" (the "Term Secured Compromise") on the basis of the consents of the Applicants who are Term Secured Creditors filed;

(c) In the alternative to (b) above an order that a meeting of the Term Secured Creditors to vote on the Term Secured Compromise pursuant to section 5 of the CCAA take place forthwith in the court room at which meeting to be chaired by the Agent, Citibank Canada the principal value of Term Secured Debt will be $197,004,139.48 as at March 27, 1991 and the Term Secured Creditors present in person or by proxy will be entitled to vote in the manner and proportionate percentage of value as hereinafter set forth:

1. ABN Amro Bank of Canada	4.16%
2. Citibank Canada	22.90%
3. La Caisse Centrale Desjardins du Quebec	4.17%
4. Hongkong Bank of Canada	4.17%
5. Paribas Bank of Canada	4.17%
6. The Chase Manhattan Bank of Canada	12.50%
7. The Toronto-Dominion Bank	7.92%
8. Swiss Bank Corporation (Canada)	10.42%
9. Banco Centrale of Canada	2.50%
10. Bank of Tokyo Canada	2.08%
11. Dai-Ichi Kangyo Bank (Canada)	4.17%
12. Credit Lyonnais (Canada)	4.17%
13. Banca Commerciale Italiana of Canada	4.17%
14. Union Bank of Switzerland (Canada)	6.25%
15. Montreal Trust Company	4.17%
16. Trust Generale du Canada (per La Caisse Centrale Desjardins du Quebec)	2.08%

	100%

At that time I endorsed the application record as follows:

> Application for a meeting pursuant to CCAA ordered for 6:00 p.m. April 10th at the offices of Davies, Ward & Beck, 44th floor, First Canadian Place to consider a proposal as set out in the application or as modified at the meeting. Meeting to be chaired by Gregory Daniels of Citibank. A verbatim record of the meeting to be kept. A record shall be kept of how all participants vote but no determination of the tabulation of the vote or percentage in favour of any proposal shall be made until the matter is argued in court. Meeting results to be submitted to the court for consideration at 9:00 a.m. April 11th.

The CCAA applies to Ball Canada since it has an outstanding issue of secured bonds issued under a trustee and the compromise or arrangement that is proposed included a compromise or arrangement between the debtor company and the holders of an issue of secured bonds. (CCAA ss. 2, 3).

I also relied on CCAA s. 5 which provides that the court can order a meeting of any class of the company's secured creditors where a compromise or arrangement is proposed between the debtor company and such class of secured creditors.

In determining that a meeting should be called, I considered the case of Re Ultracare Management Inc. et al. v. Gammon (1990), 1 O.R. (3d) 321 (Ont. Ct. Gen. Div.) where it was held that when there is a reasonable chance that the debtor company can carry on its business as a going concern, the court should order a meeting of creditors.

Further, the Term Secured Creditors and Chase, except as to amount, have an identical economic interest in the debtor company justifying their classification as a single class of creditors. The amounts owing to each are owing pursuant to the same loan agreement and the security for the obligations is that secured by the same debenture.

> Elan Corporation and Nova Metal products Inc. v. Comiskey (1990), 1 O.R. (3d) 89 (C.A.) Re Northland Properties Ltd. (1988), 73 C.B.R. (M.S.) 175 (B.C.S.C.) per Trainor J. at 191-2 affd. sub nom Northland Properties Ltd. v. Exelsior Life Insurance Company of Canada (1988), 73 C.B.R. (N.S.) 195 (B.C.C.A.).

The authority to abridge the time period for the calling of the meeting was exercised by me pursuant to ss. 67 and 70 of the Personal Property Security Act, 1989 ("PPSA").

Pursuant to s. 67 of the PPSA, I relieved compliance with Part V of the PPSA since It was, in my view, just and reasonable for all concerned parties.

The position of the applicants is summarized in the affidavit of Gregory M. Daniels as follows:

> As hereinafter described in greater detail, the Applicants and La Caisse Centrale Desjardins du Quebec and Trust Generale are 15 of the 16 Term Secured Creditors to Ball Canada holding $172,382,104.29 or 87.5% of the total principal of Term Secured Debt of $197,004,139.48 outstanding as at March 27, 1991. The balance is held by the lone dissenting Term Secured Creditor The Chase Manhattan Bank of Canada ("Chase"). An offer for the Term Secured Debt has been made by Ball Corporation ("Ball U.S.") in the amount of $120,000,000.00. Ball U.S. is unwilling to allow any person other than itself to hold any of the Term Secured Debt and has made its offer conditional upon the acquisition by it of the Term Secured Debt or the elimination of the Term Secured Debt at a discount to the face amount thereof. The offer is also conditional upon the acquisition by Ball U.S. of all of the shares of Ball Canada which are pledged to Citibank Canada as collateral for a guarantee of the Term Secured Debt given by all Packaging Product Holdings Inc. ("Ball Holdings"). The Applicants want to accept the offer, Chase does not. This Application under the Companies' Creditors Arrangement Act (the "CCAA") is made to Impose the Ball U.S. offer on Chase for the good of the Applicants, Ball Canada and its employees, suppliers, customers and others affected by the liquidation of Ball Canada. (Emphasis added).
>
> Ball Canada is a wholly owned subsidiary of Ball Holdings. To the best of my

knowledge, Ball Holdings is owned 50% by Ball Corporation and 50% by Onex Corporation ("Onex").

Certain of the original term lenders, including the Agent and Chase, have sold interests in their loans from time to time. These sales have been effected by participation agreements under which certain of the lenders have agreed to share a beneficial interest in the right to receive payments from Bell Canada in respect of the Term Secured Debt and in effect, to share any risk of the failure of Bell Canada to repay the loan in full. At present, to the knowledge of the Agent, the Term Secured Debt is now beneficially held in the following percentages as follows:

1.	ABN Amro Bank of Canada	4.16%
2.	Citibank Canada	22.90%
3.	La Caisse Centrale Desjardins du Quebec	4.17%
4.	Hongkong Bank of Canada	4.17%
5.	Paribas Bank of Canada	4.17%
6.	The Chase Manhattan Bank of Canada	12.50%
7.	The Toronto-Dominion Bank	7.92%
8.	Swiss Bank Corporation (Canada)	10.42%
9.	Banco Centrale of Canada	2.50%
10.	Bank of Tokyo Canada	2.08%
11.	Dai-Ichi Kangyo Bank (Canada)	4.17%
12.	Credit Lyonnais (Canada)	4.17%
13.	Banca Commerciale Italiana of Canada	4.17%
14.	Union Bank of Switzerland (Canada)	6.25%
15.	Montreal Trust Company	4.17%
16.	Trust Generale	2.08%

		100%

(the "Term Secured Creditors"). A list of the Term Secured Creditors as at March 19, 1991 and the percentages and dollar amounts held prepared by the Agent is appended hereto as Exhibit "A" to this my affidavit.

All Term Secured Creditors have received notice of the several meetings to discuss the various offers of Ball Canada and Ball U.S. and have had the opportunity to participate fully and vote at such meetings.

Ball Canada makes cans and other packaging for food and beverages. For the reasons detailed by the President of Ball Canada, William A. Lincoln in his Affidavit dated March 26, 1991, the business of Ball Canada, has suffered considerably in the last few years to the point where it is clear that the capital structure of Ball Canada no longer makes sense. In the foreseeable future, under any reasonable assumptions, Ball Canada will not be capable of servicing the level of debt held by the Applicants and

Chase. It was the recognition of this fact that led all parties to the course of negotiations that are described in the paragraphs that follow. The Affidavit of William A. Lincoln is appended hereto as Exhibit "B" to this my Affidavit.

Beginning in or around the Summer of 1990, Ball Canada approached the Agent with a view towards restructuring its debt obligations in light of Ball Canada's changing circumstances. In June, 1990 Ball Canada became aware of the fact that it did not comply with certain of the financial covenants contained in the Loan Agreement. Discussions between Ball Canada and the Agent on behalf of all the lenders continued throughout the balance of 1990 and into 1991 on a periodic basis with no success. Without assigning any responsibility for the lack of success, it became clear that Ball U.S. and Onex had differing interests and priorities and similarly each of the Term Secured Creditors had their own interests, views of the appropriate type of restructuring and the value of Ball Canada.

Throughout the course of all discussions and negotiations, Chase has consistently taken the position that it was not prepared to accept any compromise that was effectively a recognition that its loan participation as a Term Secured Creditor was significantly less valuable than the face amount of that participation or which did not permit it to participate in any possible future increase in the value of Ball Canada.

As the economic position of Ball Canada worsened throughout the Winter 1990 and into 1991, it became apparent that Ball Canada would not be able to survive as an on-going entity with its present debt load and scope of operations. Ball Canada began to sell assets and closed certain plants. However, the financial situation of Ball Canada was obviously such as to require a massive restructuring of the Term Secured Debt. In December, 1990 Ball Canada suspended its scheduled loan payment to the lenders. Beginning in early March 1991, the restructuring discussions took the form of an offer by Ball U.S. to purchase the debt of the Term Secured Creditors and the shares of Ball Canada held by the banks pursuant to the Share Pledge Agreement. Again there was a course of discussions throughout March between the Agent and Ball U.S. to attempt to formulate an acceptable proposal. In this respect, the position of Chase was again consistent and it continually took the position that the offers of Ball U.S. were unacceptable to it.

Throughout March, the operating position of Ball Canada continued to deteriorate to the extent that it became apparent that matters were coming to a head. The operating line of Ball Canada had been capped and cheques were being returned NSF. The projections of the company showed that it was in a substantial deficit position and unable to fund its operations through cashflow. After providing some operating advances, Ball U.S. and Onex refused to provide further operating funds.

On March 22, 1991, the Agent provided Notice of Default to Ball Canada in respect of the Term Secured Debt. Although the Operating Loan was in default and the Agent in a position to demand at any time, this five day notice apparently triggered the Companies' Creditors Arrangement Application brought by Ball Canada returnable on March 27, 1991.

On the morning of the court application the Agent had discussions with Ball U.S. setting forth the terms on which the Agent would be prepared to recommend a proposal by Ball U.S. to all the other Term Secured Creditors. No offer was

forthcoming from Ball U.S. until after the court proceedings.

The Companies' Creditors Arrangement Act application by Ball Canada and the cross-motion by the Agent for the appointment of a Receiver were heard by the Honourable Mr. Justice Rosenberg on March 27 and 28, 1991. In the result, the application by Ball Canada was dismissed and Ernst & Young Inc. appointed as Receiver of Ball Canada. A copy of the endorsement and Order of the Honourable Mr. Justice Rosenberg is appended hereto as Exhibit "C" to this my Affidavit.

After the appointment of the Receiver, Ball U.S. provided further offers. A copy of the last offer is appended hereto as Exhibit "D" to this my Affidavit. The Agent convened a meeting of the Term Secured Creditors to consider the offer of Ball U.S. and Invited Ball U.S. to make a presentation at the meeting. Eventually 15 of the 16 Term Secured Creditors determined that they were prepared to enter into the compromise suggested by Ball U.S. provided that there was no slippage in price and the terms of the agreement were made certain.

Following presentation of the offer to lenders, Chase and Ball U.S. entered into negotiations with a view to allowing Chase to maintain a debtor-creditor relationship with Ball Canada. On April 5, 1991, Citibank was advised that Ball U.S. had not entered into a deal with Chase and that negotiations were at an end.

Chase was asked to participate with the other Term Secured Creditors for the good of the majority, if not all of the Term Secured Creditors, but refused. On or about April 5, 1991, Chase confirmed that it was not prepared to accept the deal proposed by Ball U.S. The Agent advised Chase that it intended to proceed with an application under the CCAA if all the other Term Secured Creditors so instructed it and the deal with Ball U.S. could be made certain. Chase further confirmed that Ball U.S. had terminated negotiations.

La Caisse Centrale Desjardins du Quebec ("Caisse") has to date voted and participated on behalf of Trust Generale who has not attended the meetings. Caisse is a respondent in this application but has indicated that it will not contest the order being sought and will vote in favour of the Term Secured Compromise at any meeting to be held and sign the required Purchase Agreement if the Order is granted.

A meeting of the Term Secured Creditors was held on April 8, 1991. At that time all Term Secured Creditors, save and except Chase, indicated that they were in the process of obtaining the approvals necessary to accept the Ball U.S. offer subject to final documentation and to proceed with the Application. This Affidavit is provided prior to the receipt of these final approvals because of the urgency involved.

All the participants in the term debt have been advised by the Receiver on April 4 and again on April 8, 1991 of its estimation of the likely realization if there is no deal with Ball U.S. It is fair to say that the affairs and business of Ball Canada are interwoven and inter-dependent on Ball U.S. and that there is little or no prospect of a going concern sale of Ball Canada to a party other than Ball U.S. Ball U.S. of course is interested in the going concern and for that reason is prepared to make arrangements to continue Ball Canada in the ordinary course of business including allowing Ball Canada to meet its liabilities as they come due. I verily believe the information provided by the Receiver to be accurate and it played an Important basis

for the Agent and the other applicants seeking approval of the Term Secured Compromise.

For these reasons the Secured Creditors find themselves in the somewhat unusual position of accepting an offer which will see unsecured creditors being paid in full when the Term Secured Creditors are not being paid in full. Based on the estimates of the Receiver, and the realities of the situation, a liquidation of the assets will provide far less to secured creditors than the Ball U.S. offer. In addition, the Applicants are mindful of the benefit achieved by the maintenance of Ball Canada as a going concern to its employees, suppliers and customers.

Chase has indicated its adamant opposition to the Ball U.S. offer and Its unwillingness to abide by the determination of the 15 other Term Secured Creditors. For this reason, an Application under the CCAA is the only means available to the Applicants.

PERSONAL PROPERTY SECURITY ACT, 1989

Part of the Term Secured Compromise is the transfer of the shares of Ball Canada to Ball U.S. The Agent sent a notice pursuant to Section 63 of the PPSA on April 4, 1991. A copy of the said Notice and proof of service is appended hereto as Exhibit "E" to this my Affidavit.

Onex has taken the position that its consent is necessary to any transfer of the shares. I am informed by Ian Douglas, a partner of Stikeman, Elliott, counsel to the Agent and verily believe that he received letters dated April 3 and April 4, 1991 from counsel to Onex to this effect. Appended hereto as Exhibit "F" to this my Affidavit are copies of the said letters. I am further informed by Ian Douglas and verily believe that the position of Onex is completely untenable as against the Agent and a copy of his response by letter dated April 4, 1991 is appended hereto as Exhibit "G" to this my Affidavit. As set out in the letter, Onex has indicated that it does not wish to redeem with Onex so the transfer to Ball U.S. will not have any Impact on the issues as between Ball U.S. and Onex.

Accordingly and pursuant to my order of April 10th, a meeting was held and the hearing resumed on the morning of April 11th. At that time the affidavit evidence disclosed that the offer of Ball U.S. was open for acceptance and court approval only until 12:00 noon on that date and the reasons for the urgency and the deadline were explained by further affidavit. At that time the further affidavit of William R. Beavers, a Vice-President of Ernst & Young Inc. (the "Receiver"), attested to the following:

Since its appointment pursuant to the receivership order, the Receiver has had to deal with a number of critical issues in order to ensure the integrity of the business with a view to maximizing the possibility of a sale of all or part of the business as a going concern. For the reasons expressed below, I am of the view that the passage of even a very short time in the absence of a resolution with Ball Canada's 50% parent, Ball Corporation of Muncie, Indiana ("Ball Corp.") will considerably diminish if not preclude the ability of the Receiver to maintain the going-concern value of Ball Canada.

The Receiver has had a number of problems ensuring the supply of raw materials necessary to the continuation of the business. Ball Canada's business is largely a

> seasonal one. At this phase of its annual business cycle, Ball Canada is primarily in the phase of building up Inventories to fulfil sales contracts for delivery in the summer and early fall to the beverage industry and the Food packing industry.
>
> Two principal suppliers of Ball Canada have indicated a reluctance to continue supplying the raw materials necessary "to continue production unless arrears for previously delivered material are settled. ... was the primary supplier of aluminium to Ball Canada. ... has taken steps to seize certain aluminium Inventories stored in the United States as a result of the default by Ball Canada in paying for such inventories. Other suppliers such as ... have indicated that they are reviewing their commitments to Ball Canada.
>
> In the medium to long term, unless arrangements can be made with ... to continue the supply of these essential raw materials, the ability of the Ball Canada to continue to produce sufficient product to meet sales obligations will be seriously jeopardized. While alternative sources of supply of these materials is possible, it would take time to make arrangements with such suppliers and the terms of supply may be more onerous than those previously enjoyed by Ball Canada.
>
> In addition to supplier problems, the Receiver has had to deal with key customers of Ball Canada in order to reassure them as to tee continuity of their supply. Five key customers of Ball Canada accounted for 58% of Ball Canada's 1990 sales. The loss of any one of these accounts would have a devastating effect upon the going concern value of the business of Ball Canada. Some customers account for such a significant portion of production from certain plants that a loss of the customer could result In an immediate plant closure. I have spoken with three of these customers. They have indicated to the Receiver that, unless they receive satisfactory assurances or guarantees of product supply in the next few days, they will have no alternative but to seek alternate sources of supply for their can requirements. In view of the lead time necessary to secure product for these accounts, customers such as ... require assurances of supply as soon as possible for they may be otherwise unable to obtain product in time for the crucial summer selling season.
>
> The case of ... has become especially critical. ... utilizes steel cans in Ontario, one of the few large markets for steel cans remaining in North America. I attach as Exhibit "B" and "C" respectively to this my affidavit letters which the Receiver has received from ... dated April 2 and April 5, 1991. As appears from these letters ... has been extremely nervous about the continuity of its supply. ... has reluctantly extended its deadlines in order to hear from the Receiver and Ball Corp. as to whether Ball Corp's plans to purchase Ball Canada will be proceeding. Another key food industry customer of Ball Canada is taking a similar position.

The letter attached as exhibit "C" contains the following statement:

> In an effort to ensure that the ... system does not experience any supply shortages, please be advised that we will consider the possibility of enacting an alternative supply contingency plan should a positive response from you or your parent corporation not be received by Monday, April 8th, 12 noon E.S.T.

William R. Beavers in his affidavit further stated:

Although I have attempted to assure these three customers that the Term Secured Compromise has received wide support and is progressing quickly, I have been advised by ... Director of Purchasing at ... and verily believe that ... has determined that it must award Its contract for supply of cans by April 10, 1991 or April 11 at the very latest and cannot delay any longer. If Ball Canada loses the ... contract, its Ontario business would be devastated and plant closures would ensue, resulting in significant job losses and eliminating any chance of proceeding with the Term Secured Compromise.

Ball Canada currently owes approximately $1.4 million to certain of its major customers in respect of volume discounts arising out of pre-receivership sales to such customers. In view of the current over-supply in the Canadian and North American can market, the Receiver will be required to honour this unsecured commitment in order to retain the business of these key customers.

The operations of Ball Canada are also largely dependent upon the cooperation of Ball Corp. The two businesses have become interconnected in the last two years. Some of the principal areas of dependency of Ball Canada upon Ball Corp. are as follows:

a. Ball Canada and Ball Corp. are parties to three agreements dated as of December 8, 1988 (the Joint Venture Management and Technical Services Agreement, the Proprietary Technology Licence Agreement and the Metal Container Product Technology Cross-Licence Agreement) pursuant to which Ball Corp. has provided senior management, technical personnel and technology to Ball Canada.
b. Ball Canada currently obtains supply as required of certain finished goods from Ball Corp. In order to meet its supply obligations to customers while production line conversion projects (described below) in Whitby, Ontario and Richmond, British Columbia are in progress. In addition, Ball Corp. supplies any surplus requirements of Molson that the Bay d'Urfe plant is not able to supply The continuation of these conversion projects is also dependant upon Ball Corp. technical personnel.
c. Ball Corp. currently supplies all information Systems used by Ball Canada to manage all of its accounting, purchasing, inventory control, invoicing and operating systems from Ball Corp's computer facilities in Indiana. I attach as Exhibit "D" to this my affidavit a copy of a list which the Receiver has prepared outlining the Ball Canada information systems currently being run from Ball Corp's computers in Indiana. Continued access to these systems is critical to the continuation of the business of Ball Canada.
d. Ball Canada has been benefiting from volume discounts by joining with Ball Corp. for the purpose of procuring its requirements in aluminium.

As mentioned above, the Whitby and Richmond plants are currently in the midst of line conversion projects designed to enhance the competitiveness of these two plants and the ability of Ball Canada to compete in the North American marketplace. At the Richmond plant, the line conversion project is designed to increase the line speed to North American standards while the Whitby project is designed to convert to 12 oz. can production to meet market demands. Both of these projects are important to the restructuring of Ball Canada to ensure its ability to compete in the North American market which has been largely opened as a result of the Free Trade Agreement and

will enhance the value of the business as a whole. In order to continue these projects in the receivership, the Receiver will have to negotiate terms with the contractors on the project who claim lien rights totalling approximately $2 million for arrears of contract fees due but not paid. As previously indicated, the Receiver will also require the cooperation of Ball Corp. In the United States in order to continue to supply its customers while the conversion projects are completed.

The Receiver has been required to deal with a number of other suppliers of goods and services who have been seeking to assert lien claims or to obtain concessions regarding pre-receivership accounts as a condition of future dealing. A customs broker has been refusing to release certain goods imported by Ball Canada from a customs warehouse unless account arrears are settled.

The employees and unions dealing with Ball Canada are naturally extremely anxious about the receivership and the effect that it will have upon their future employment and on their statutory and collective agreement rights to severance and termination amounts. I enclose as Exhibit "E" correspondence sent to the Receiver by various unions expressing their concerns. These unions are aware that Ball Corp. is endeavouring to acquire Ball Canada on terms which would permit Ball Canada to honour all of its obligations to employees.

We have also prepared preliminary cash flow projections for Ball Canada in receivership for the period ending on April 28, 1991. This cash flow projection and notes, which is attached and marked as Exhibit "F" to this my affidavit, shows that the Receiver will be required to spend a total of $27.54 million in respect of ongoing operation plus a further possible $6.62 million in respect of arrears which may have to be paid in order to continue operations for a total of $34.16 million. As a result of the receivership and the seasonal nature of the business, cash inflows for this same period are estimated to total $15 million, resulting in a net funding requirement of up to $19.16 million. The Receiver is currently only able to borrow up to $20 million secured by Receiver's Certificates pursuant to the Order of March 28, 1991. The Receiver has arranged temporary funding up to that level, but this arrangement expires on April 30, 1991. In view of the risks and contingencies associated with continuing to run the business, there is considerable doubt as to the ability of the Receiver to access further funds from a bank even if permitted to do so by an amendment to the Order.

While the Receiver is making every effort to stabilize the business and mitigate the risks to the going concern value of the business posed by the difficulties and risk factors mentioned above, it is my view that the ability of the Receiver to maintain that value is uncertain and decreases daily. If the Receiver is not able to provide the marketplace with concrete assurances as to the future direction of Ball Canada, there is a serious risk that the value of the business will decline dramatically in the next few days or weeks.

TERM SECURED COMPROMISE

I have reviewed the Term Secured Compromise referred to in the Notice of Application under the Companies' Creditors Arrangement Act (Canada). The Receiver has been asked to seek certain amendments to the March 28 receivership order in order to implement the Term Secured Compromise. The Receiver

unreservedly and unequivocally believes this is the best possible deal in the present circumstances for the reasons outlined below. The Receiver has reviewed the assets and business of Ball Canada for the purpose of preparing for a possible sale of Ball Canada. The Receiver has not as of yet completed the preparation of an information package for potential purchasers of the business of Ball Canada for the purpose of preparing for a possible sale of Ball Canada. The Receiver has not as of yet completed the preparation of an information package for potential purchasers of the business of Ball Canada or commenced any such negotiations. Based upon its review, the price of $120 million for the term debt of Ball Canada proposed in the Term Secured Compromise represents in excess of the end of the Receiver's estimates of the realizable value of the assets of Ball Canada in liquidation even if the Receiver is able successfully to maintain the going concern value of the business. It is the opinion of the Receiver that the business of Ball Canada has special value to Ball Corp. and that Ball Corp. is willing to make this offer for tax and other benefits that are unique to it. Since the Term Secured Compromise does not contemplate any other debt of Ball Canada being compromised, its economic value is far higher than $120 million. In my view, recoveries upon the assets would be considerably lower if the business begins to decline as a result of the loss of significant customer accounts or in the event of production interruptions or other difficulties which may be experienced in the coming days and weeks in view of the risk factors outlined above.

The Term Secured Compromise provides a means for the Receiver to obtain a secure source of operating credit for Ball Canada. As indicated above, the ability of the Receiver to raise the operating funds required to maintain the stability of the business of Ball Canada for the time required to seek out buyers for the business is uncertain. The current financing which the Receiver has negotiated expires at the end of April, 1991.

In the opinion of the Receiver, the Term Secured Compromise is in the best interests of Ball Canada and all of its creditors. As indicated above, it is my opinion that the term secured creditors will receive more under the Term Secured Compromise than they would under a liquidation supervised by the Receiver. Furthermore, as a result of the Term Secured compromise, Ball Canada will be able to come out of receivership. This will provide a means for the trade creditors, customers, suppliers and employees to be ensured that their claims will be satisfied by Ball Canada in the ordinary course of business. This is in the best interests of the communities in which Ball Canada carries on business and its 1700 employees. An example of these types of concerns, which the Receiver believes are something the Receiver should keep in mind, is articulately expressed in the letter of Bob Speller, the member of Parliament for Haldimand-Norfolk that I attach hereto as Exhibit "G" to this my affidavit.

If the Term Secured Compromise is approved by this Honourable Court, the Receiver will be required to take the steps outlined below in the interim period between approval of the agreement and its completion expected before April 25, 1991. It is anticipated that Ball Corp. will move to have the Receiver discharged immediately following completion of the Term Secured Compromise and that Ball Canada will resume business in the ordinary course under the control and direction of Ball Corp. thereafter.

In order to implement the Term Secured Compromise, the order appointing the Receiver must be varied in several respects. Firstly, the authority of the Receiver to borrow funds pursuant to paragraph 18 of the Order is required to be increased from

> $20 million to $30 million. This is required pursuant to clause 9(b)(iii)(A) of the Purchase Agreement contemplated by the Term Secured Compromise in order to ensure that the Receiver and Ball Canada will have authority to access sufficient working capital until closing. As indicated above, the Receiver's current forecasts indicate that the full authorized financing will be utilized in the coming weeks with very little margin of error if no amendment is made. An additional level of borrowing will be required to fund the requirements of Ball Canada on closing of the Purchase Agreement as referred to in section 10 thereof.
>
> A second required amendment is for this Court to direct and permit the Receiver (i) to permit Ball Corp. to manage Ball Canada and its business in accordance with the existing Joint Venture Management and Technical Services Agreement (the "Management Agreement") dated December 8, 1988 (a copy of which I attach as Exhibit "H") to this my affidavit); (ii) to cooperate with officers of Ball Canada to operate the business of Ball Canada in the ordinary course of business as an on-going business with a view to avoiding any material reduction in the value of the business; (iii) not to sell any asset of Ball Canada except in the ordinary course of the business of Ball Canada; and (iv) not to terminate voluntarily the employment of an employee of Ball Canada or any material contract of Ball Canada. This amendment has been required by Ball Corp in order to provide them with some degree of comfort concerning and control over the occurrence of any material adverse change in the business between the date of the approval of the Term Secured Compromise and the closing of the Purchase Agreement contemplated thereby.

Since the hearing of April 11th, the orders in accordance with the above two paragraphs were granted.

Although the affidavit evidence at the time of the preparation of the applications for April 10th and April 11th indicated that the only dissenting participant was Chase Manhattan, at the hearing there were some other participants who indicated that they were not prepared to approve the proposed plan. However, the necessary percentage in amount and number approved.

DECISION

The first issue to be determined in assessing the vote at the meeting on the night of April 10th is whether the banks participating in the loan by Chase to Ball Canada (the "Participants"), are secured "creditors" of Ball Canada.

The CCAA authorizes the court to order a meeting of "unsecured creditors" or "secured creditors" or any class of them for the purpose of voting on a proposed compromise or arrangement between them and the debtor company (see ss. 5 and 6). "Secured creditors" is defined in s. 2 (in part) as meaning:

> a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds; (Emphasis added)

The Participants are the beneficial "holders" of a proprietary interest in Ball Canada which secures the indebtedness of Ball Canada and which the Participants have purchased pursuant to the terms of the Master Participation Agreements.

The word "holder" as used in this definition should be given a liberal interpretation in keeping with the broad remedial nature of the CCAA and therefore includes the beneficial holders of any bond or proprietary interest. As with judicial interpretation relating to the determination of a "class of creditors", the statute's reference to "creditors" is to be interpreted so that the voice of the persons with the real economic interest in the debtor company is heard. The exception of the trustee under a trust deed from the class of creditors entitled to vote confirms this proposition. The fact that a trustee under a trust deed, although the holder of the legal title to the obligation under the bond and the security is not a secured creditor for the purpose of voting, favours the view that those with the beneficial or real economic interest in the debt and security are the creditors entitled to vote.

Section 4(b) of the Master Participation Agreement recognizes that a Participant is entitled to "its share" of any amounts received by Chase in a realization by it (or presumably its agent) of its collateral. The Participant's share is its percentage ownership interest in the underlying loan obligation purchased. This provision recognizes that the Participant has an equitable proprietary interest in the property of the borrower as security for that borrower's indebtedness, and is, therefore, a secured creditor of Ball Canada.

The relevant part of s. 4(b) reads:

> Further, the Participant shall not have any rights to or in any collateral, other property or right (including any right of set-off) which may be or becomes available for the payment of any Participated Loan, except that If an such right is exercised by the Bank and the amounts recovered thereby are applied on account of any amount in which the Participant is entitled to share as provided in Section 4(a), the Bank will promptly pay to the Participant its share thereof as provided therein. (Emphasis added).

That the Participant pursuant to the terms of the Master Purchase Agreement waives vis-a-vis Chase some of the rights that would normally accompany such an assignment (such as the right to give the debtor notice of the assignment) is not of significance in the CCAA proceedings. Section 8 of the CCAA provides that relief under the CCAA is available notwithstanding the terms of any agreement.

> 8. This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument.

The court's power to deal with the interests of the Participants in the debt owed by Ball Canada is, therefore, unaffected by the Master Participation Agreement or any other instrument.

Having accordingly ruled the vote was 86.67% in favour in number and 80.85% In favour on the basis of value and accordingly the proposal was approved by the necessary percentage in both number and value.

The jurisdiction of the court under the CCAA should be given a large and liberal interpretation consistent with the remedial nature of the legislation. As recently stated by Doherty J.A. in the Ontario Court of Appeal in his dissenting reasons in the case of Elan Corporation and Nova Metal Products Inc. v. Comiskey, supra, at p. 306:

> The legislation is remedial in its purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor-initiated termination of ongoing business Operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

In the same case Finlayson J.A. with whom Krever J.A. concurred stated at p. 297:

> It is well established that the CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Such a resolution can have significant benefits for the company, its shareholders and employees. For this reason the debtor companies ... are entitled to a broad and liberal interpretation of the jurisdiction of the court under the CCAA...

The purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees. That this is its fundamental purpose is emphasized by the following passage from the reasons of Gibbs J.A. of the British Columbia Court of Appeal in Chef Ready Foods Ltd. v. HongKong Bank of Canada (1990), 51 B.C.L.R. (2d) 84 (B.C.C.A.) at pp. 91-2:

> The C.C.A.A. was enacted by Parliament in 1933 when the nation and the world were in the grip of an economic depression. When a company became insolvent liquidation followed because that was the consequence of the only insolvency legislation which then existed - the Bankruptcy Act and the Winding-up Act. Almost inevitably liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A. to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

THE POSITION OF ONEX INC.

Onex Inc. held shares in a holding company with Ball U.S. that in effect gave it a 50% interest in the shares of Ball Canada. These shares as previously stated were pledged as part of the loan agreement. Ball U.S.'s offer was conditional upon it obtaining 100% of the shares of Ball Canada. Ordinarily, in an arrangement of this kind, the shares of the company making the arrangement have little or no value. In this case however, other creditors were being paid in full and the business was to be carried on. It was understandable and appropriate that Ball U.S. In assuming all of the responsibilities and putting in the funds that it was obligated to do under its offer would want to be in full control of the company. The rights of Onex as against Ball U.S. are not affected by my approving the compromise plan and ordering the shares to be transferred to Ball U.S. since any rights that Onex has under any agreements with Ball U.S. are not being altered amended or considered as part of these proceedings. In order to comply with the terms of the proposal and the Ball U.S. offer, it was necessary to have the shares conveyed immediately and to implement this conveyance of the collateral security held, I made an order abridging the notice period provided in s. 63(4) of the PPSA. On the date of closing of the Term Secured Compromise with respect to the transfer of the shares of Ball Canada held as security for the guarantee of Ball Holdings pursuant to s. 70 of the PPSA, and pursuant to s. 67 of the PPSA, I authorized and approved the transfer by Citibank Canada as agent of all the right, title to and interest in the shares of Ball Canada to Ball Corp. pursuant to the Terms Secured Compromise. I also relieved the agent from

further compliance with Part V of the PPSA.

I endorsed the record on April 11th as follows:

> In my view the beneficial owners of the security are each entitled to vote their percentage interest. On that basis the vote in favour of the proposal has exceeded the necessary number and value required. Accordingly the order is to issue in the form approved.

The evidence before me demonstrated overwhelmingly that it was in the interest of all of the creditors that the proposal be approved. While it was extraordinary that ordinary creditors be paid in full while secured creditors received only part payment, there was no alternative. This was confirmed by the overwhelming support of the proposal from the creditors with the notable exception of Chase Manhattan. The evidence put before me with regard to the proposal and the fact that the proposal was in the best interests of all of the creditors was confirmed by the large number of representatives of financial institutions, officers and directors of same who attended the meeting and voted so overwhelmingly in favour of the compromise. The wishes of these sophisticated financiers should not lightly be discarded by the court. Accordingly, the compromise plan was approved and implemented even under the most unusual circumstances and time constraints that existed.

ROSENBERG J.